STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2005
v	No. 250838 Oakland Circuit Court
TRACY LYNN COWAN, Defendant-Appellant.	LC No. 2002-187234-FC

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right her conviction and sentence following a jury trial for possession with intent to deliver more than 650 grams of a cocaine, MCL 333.7401(2)(a)(1), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(3), and two counts of felony-firearm, MCL 750.227b. The trial court sentenced defendant to a mandatory minimum term of 20 to 40 years on the cocaine conviction and 6 to 24 months on the marijuana conviction, each of which follows and runs consecutively to concurrent terms of two years in prison on each felony-firearm conviction. We affirm.

A charged drug-dealer-turned-informant named a man who lived on Clarita Street in Wayne County as one of his sources for cocaine. Police began monitoring the address and confirmed that the address experienced heavy foot traffic and other activity indicative of a drug house. Police observed as the informant called his source and set up a cocaine purchase. Police then monitored the informant as he arrived at the Clarita Street address and discussed the proposed sale with his source. The source confirmed that he would provide the informant with the requested cocaine and asked the informant to drive him to a different house – defendant's residence. The informant obliged and the source entered defendant's residence, returning a few minutes later with a plastic baggie containing 2 ½ ounces of a powdery white substance in his pocket. They then returned to the Clarita Street address, and the source took the baggie inside. Police continued to monitor the situation as the source came back out of the house and entered the unattached garage. When the source came out of the garage, he carried two small baggies of cocaine, which he gave to the informant. The informant paid the source with prerecorded bills provided by police and drove away. He drove to a rendezvous point and turned the baggies over to police.

Police sought warrants for both the house on Clarita Street and defendant's house. According to the affidavit for the warrant on defendant's house, the informant told police that the

source went into defendant's house and returned with 3 to 4 ounces of cocaine. To bolster the informant's credibility, the affidavit indicates that the informant voluntarily conducted the buy, and that he provided narcotics information contrary to his penal interest. While the affidavit did not mention that the informant had been charged with possession of a controlled substance, later testimony revealed that the informant was not promised leniency but was only assured by police that they would vouch for his cooperation at sentencing. The affidavit also claims, in a conclusory manner, that the informant was a credible and reliable source of information based on undisclosed personal observations. The magistrate issued a search warrant for defendant's home.

During their search of defendant's house, police discovered over 700 grams of cocaine, over 250 grams of marijuana, baggies and other packaging material, a scale, a loaded twelve gauge shotgun, a loaded nine millimeter handgun, and women's clothing in a closet in the master bedroom. In the basement, police found several "cocaine presses" for turning powder cocaine into densely packed "bricks," a blender, single-edged razor blades, baking soda and other "cutting" agents, a digital scale, rubber gloves, more packaging, and another 800 grams of cocaine. One of the boxes of baking soda had defendant's thumbprint on it.

Defendant first argues that the trial court erred when it denied her motion for a hearing under *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978), to review intentional misrepresentations contained in the affidavit supporting the search warrant. We disagree. A trial court should only grant a hearing under *Franks* if the defendant "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and that the issuing magistrate substantially relied on the statement in issuing the warrant. *Id*. As the prosecution has reiterated at every stage of defendant's challenge to the affidavit, defendant has not demonstrated that any statement in the affidavit is actually false. While the sequence of events in the affidavit do not strictly conform to the detailed testimony elicited at trial, the important facts were that the source emerged from defendant's residence with several ounces of cocaine, indicated this fact to the informant, and took the cocaine back to his own house where he said he would "cook it up." Defendant fails to present any indication that these essential facts were false.

Defendant further claims that an omission of information suffices to establish a false statement, but defendant fails to demonstrate anything that would constitute a serious omission from the affidavit. The facts contained in the affidavit were confirmed by surveillance, so the fact that the informant had drug charges pending, or even a drug conviction, would not seriously discredit the information he provided and would likely bolster his overall credibility. Therefore, the trial court did not err when it held that defendant failed to make a sufficient showing of false statement or omission that would justify a hearing. *Id.*

Defendant next argues that her counsel committed various trial errors that deprived her of her right to effective assistance of counsel. We disagree. Because defendant did not seek a

Ginther[1] hearing or move for a new trial, we limit our review to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id*. at 140, citations omitted.]

Here, the errors cited by defendant are either nonexistent or do not amount to prejudicial error. Defendant first argues that trial counsel failed to object to "profiling" evidence introduced by the prosecution through the detective in charge of the investigation. As an initial matter, the decision to stipulate to the detective's credentials rather than allow the prosecutor to bolster his witness with extensive voir dire was sound trial strategy. Further, the evidence introduced was not impermissible "profiling" evidence, but expert background information about how some of the household items found near the drugs related to the drug trade and whether the volume and expense of the drugs found in defendant's home were consistent with personal use or distribution.

Defendant also claims that her trial counsel prejudicially erred by eliciting testimony from the informant that he actually saw the cocaine that his source obtained from defendant's house. However, the record to that point, including the warrant affidavit, only indicated that the source told the informant what he had obtained at the house. Given the extensive development of the record before trial, defendant fails to demonstrate how any further investigation by counsel would have been reasonable or productive. Therefore, we will not fault defense counsel for exploring at trial a factual issue that he could reasonably anticipate would strongly favor his client. Likewise, the introduction of evidence regarding "stash houses" was central to the theory that defendant was ignorant that the drugs were in her home, so its introduction was important and did not inappropriately "open the door" to other damaging testimony. The trial court's refusal to allow video footage of defendant's basement was likewise unrelated to any error by trial counsel and, moreover, did not prejudice defendant. The tape's footage was hopelessly confusing and added little to the still photographs and testimony that defendant later introduced. MRE 403.

Finally, defendant argues that her trial counsel should have objected to the introduction of an interrogating officer's testimony that he believed defendant knew about the drugs in her house. The testimony followed the prosecutor's introduction of a videotape recording of defendant's interrogation where the officer stated that he did not believe defendant had anything to do with the drugs. The officer explained at trial that his statements during the interview were merely investigative subterfuge and did not reflect his actual views. The evidence of the officer's opinion was relevant to explain the earlier comments on the tape, and the prosecutor

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

narrowly tailored her questions to that end. The evidence was not framed as an expert opinion of the ultimate question, nor did it have that authoritative thrust. During cross-examination, defense counsel strategically used the evidence of the officer's equivocation to undermine his credibility. Therefore, defendant fails to demonstrate any error in her trial counsel's decision to allow the evidence to stand. The cases cited in defendant's appellate brief deal with prosecutors vouching for witnesses and are inapposite to the issue. Because defendant fails to point to anything in the record that supports her claims of prejudicial error, we do not find ineffective assistance.

Defendant's final argument concerns the sentencing court's decision to sentence her according to a twenty-year minimum prescribed by an older version of MCL 333.7401 that was in effect at the time of defendant's arrest rather than sentence her under the current, more lenient, amended version. Defendant's argument fails because this case is on all fours with our recent decision in *People v Thomas*, 260 Mich App 450, 457-459; 678 NW2d 631 (2004), where we held that the sentencing court properly applied the minimum sentence contained in the statute's earlier version.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell